

FET-19

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE
THE BOARD OF PATENT APPEALS**

**In re application of
Michael W. Lassota
and
Zbigniew G. Lassota
Appln. No. 10/631,118**

Filed: July 31, 2003

**“FOOD PROCESSING
APPARATUS WITH
AUTO-DIRECTIVE
CONTROLLER”
Examiner: Reginald L. Alexander
Art Unit: 3742
Confirmation No. 3943**

APPEAL BRIEF

I. REAL PARTY IN INTEREST

The real party in interest is Food Equipment Technologies Company, Inc., an Illinois corporation, with offices at 600 Rose Street, Lake Zurich, Illinois 60047, the assignee of this application.

II. RELATED APPEALS AND INTERFERENCES

There no appeals, interferences or judicial proceedings known to appellant or the appellant's legal representative or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in this pending appeal.

III. STATUS OF CLAIMS

Claims 1-6, 8-26, 28-31, 33, 37-39, 46, 91-93, 97-99, 101, 104, 106 and 108-123 are allowed.

Claims 32, 34, 40-45 and 107 are all dependent on claim 26, which is allowed, and are therefore also believed allowed, even though such allowance has not been expressly stated in the Final Office Action.

Claims 7, 27, 46-90, 94-96 and 100 are canceled.

Claim 102, 103, 105 and 124 are finally rejected.

IV. STATUS OF AMENDMENTS

The last amendment that was entered was Amendment F filed on February 28, 2008 in response to the non-final Office of December 28, 2007.

Amendment G filed July 2, 2008 in response to the Final Office Action of May 16, 2008, was refused entry in the Advisory Action of July 29, 2008.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Independent Claim 102. This claim covers a food processing apparatus [Fig. 1, brewer 20] capable of performing a plurality of processes on a food ingredient [e.g. passing a selected amount of hot water onto coffee grounds over a selected period of time, selectively passing hot water past the coffee grounds to dilute the freshly brewed coffee, selectively changing the temperature of the brew water passed onto the ground coffee, etc.] which includes a heating element a plurality of valves [Fig. 1, brew valve left 31, brew valve right 33, fill valve 44, bypass valve 45, bypass valve right 47, hot water dispense valve 49] and a manual control system [Fig. 1, auto-directive phantom control panel assembly 3 with auto-directive brewer controller 22] .

The manual control system includes means for selectively operating the apparatus in accordance with a normal operations mode [Fig. 12B, start normal operations mode 166, etc.; p.29, line 26-31-p.31, line 29] in which the heating element [Fig. 1, heater 35]and the plurality of valves [Fig. 1, brew valve left 31, brew valve right 33, fill valve 44, bypass valve 45, bypass valve right 47, hot water dispense valve 49] may be operated in accordance with a normal operations program [Fig. 1, brew valve left 31, brew valve right 33, fill valve 44, bypass valve 45, bypass valve right 47, hot water dispense valve 49] and means for selectively operating the apparatus in accordance with one of three other modes of operation.

One of the three other modes of operation is a program mode [Fig. 12D, program mode start 150, etc.] in which various programmable parameters that dictate operation in the normal operations program may be selectively excluded and other parameters may be established [Abstract, lines 9-14; p.15, lines 17-19; p.23, lines 16-23; p.24, line 20-p.29, line 26].

Another one of the modes of operation is a self-diagnostic mode [Fig. 12A, step 151; Figs. 13A and 13B; p.23, lines 25-32; p.26, line 13; p.29, line 24] in which faults in the apparatus are detected [Figs. 13A and 13B]

The third mode of operation is a demonstration mode [Fig. 12A, step 155] in which the normal operations mode may be demonstrated, or simulated, without actually operating the normal operations mode except for selected functions [Abstract, lines 14-16; p. 10, lines 23-31; p.24, lines 1-11]

Claims Dependent Upon Claim 102.

Claim 103. The food processing apparatus of claim 102 includes an electronic message display [Fig. 1, Fig. 11B; fig. 13A and B; p. 17, lines 7-13; p.23, lines 25-29] program mode[Fig. 12D, program mode start 150, etc.], the self-diagnostic mode [Fig. 12A, step 151; Figs. 13A and 13B; p.23, lines 25-32; p.26, line 13; p.29, line 24] and the demonstration mode[Fig. 12A, step 155].

Claim 105. The food processing apparatus of claim 102 includes an electronic display [Fig. 1, Fig. 11B; fig. 13A and B; p. 17, lines 7-13; p.23, lines 25-29] that is operated in accordance with the self-diagnostic mode[Fig. 12A, step 151; Figs. 13A and 13B; p.23, lines 25-32; p.26, line 13; p.29, line 24] to display error codes [figs. 13 A and 13B] associated with different fault conditions that are detectable by the self-diagnostic program.

Claim 124. The food processing apparatus of claim 103 in which the electronic display [Fig. 1, Fig. 11B; fig. 13A and B; p. 17, lines 7-13; p.23, lines 25-29] is selectively revealed during all of the program mode[Fig. 12D, program mode start 150, etc.] [Abstract, lines 9-14; p.15, lines 17-19; p.23, lines 16-23; p.24, line 20-p.29, line 26], the self-diagnostic mode[Fig. 12A, step 151; Figs. 13A and 13B; p.23, lines 25-32; p.26, line 13; p.29, line 24] and the demonstration mode[Fig. 12A, step 155] [Abstract, lines 14-16; p. 10, lines 23-31; p.24, lines 1-11].

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VI. GROUNDS OF REJECTION

All claims have been finally rejected on a new ground of rejection first set forth in the Final Office Action under 35 U.S.C. 103(a) as being unpatentable over Warne 6,095,031 in view of Fisher et al. 7,186,955.

VII. ARGUMENT

A. IT IS CONCEDED THAT WARNE FAILS TO SHOW OR SUGGEST A DEMONSTRATION MODE.

After the claims at issue were rejected under 35 U.S.C. 102(a) over Warne in the Non-final Office Action of December 28, 2007, in the Final Office Action of May 16, 2008, this ground of rejection was withdrawn and the current grounds of rejection under 35 U.S.C. 103 was first introduced. The examiner is no longer asserting that there is the slightest suggestion of a demonstration mode in Warne. Instead, reliance for disclosure of a “demo mode” is solely on Fisher et al.

Thus, it has been conceded that the beverage brewer of Warne totally fails to show or suggest the use of a demonstration mode, or “demo mode”, in which the normal operation of the brewer is only simulated.

In fact, no such “demo mode” is disclosed in Warne. In the demo mode of the present invention, the lighting of different switch icons and the timing of different operations when switches are actuated is demonstrated while the actual opening and closing of valves is inhibited to facilitate training of new operators without risk of inappropriate entries and without the necessity of actually performing brew cycles. In this mode of operation, the opening of the various brew valves, dispense valves bypass valves and fill valve in response to actuation of the control switches or otherwise in accordance with the operating program is inhibited. Also, such a demo mode is also not disclosed in Fisher et al. in which only a heating element is inhibited from operating and there apparently is no lighting of different switch icons and the timing of different operation when switches are actuated are demonstrated or simulated, but as indicated below this issue is moot, since Fisher et al. is not proper prior art.

B. FISHER ET AL. DOES NOT HAVE AN EFFECTIVE FILING DATE EARLIER THAN THAT OF THIS APPLICATION ON APPEAL

The rejection instead relies upon Fisher et al. to provide the suggestion of a “demo mode”. It is asserted that Fisher et al. discloses a programmable controller which allows operation of a heating device in a “demo-mode” which would allow a user to learn to operate the stove top without actually powering the heating elements and that it would be obvious to a person of ordinary skill in the art to combine this demo mode of Fisher et al with the beverage brewer of Warne which lacks such a demo mode.

1. The Actual Filing Date of the Fisher Reference is Not Prior.

However, the actual filing date of Fisher is June 30, 2005 which is nearly two years later than the actual filing date of the present application ---July 31, 2003, and almost three years later than the effective filing date of July 31, 2002.

2. The CIP Parent Application Does Not Disclose a Demo Mode.

The one brief reference to a “demo mode” found at col. 7, lines 38-40 of Fisher is not found in the application of Shukla et al., now patent 6,933,474, which is asserted to be the continuation-in part parent application of Fisher et al.. Even if a demo mode were disclosed in Shukla et al, the Shukla et al. patent issued March 6, 2007, long after the effective filing date of the present application, so that it too fails to qualify as a reference by itself. Accordingly, the effective date of Fisher et al. with respect to the reference to a “demo mode” is the actual later filing date of Fischer et al and not the earlier filing date of Shukla et al. Accordingly, Fisher et al., with respect to disclosing the “demo mode” is not prior to the present application and thus is not prior art upon which the examiner may rely to reject any of the claims.

3. There is No Common Inventorship Between Fisher et al and the Alleged CIP Parent of Fisher et al.

Moreover, there is no common inventorship between Fisher and Shukla et al. The indicated inventors of Fisher et al. are Gary fisher and Chris Ray Blackson while the indicated inventors of Shukla et al. are Sanjay Shukla and James E. Pryor. Since, there is no common inventorship, Fisher et al. is not a proper continuation-in-part application of Shukla et al. Thus, Fisher et al. does not obtain the benefit of the earlier filing date of Shukla et al. for any purposes even if the Shukla application did disclose a “demo mode”.

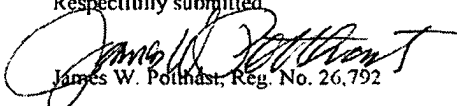
C. A REJECTION UNDER 35 U.S.C. 103 BASED IN PART ON A REFERENCE THAT IS NOT PRIOR ART BECAUSE IT IS NOT PRIOR CANNOT STAND

The law is clear that a rejection based in whole or in part on alleged prior art which, in fact, is not prior and does not qualify as prior art under 35 U.S.C. 102 or 35 U.S.C. 103 is an improper rejection and cannot stand. The reasons given for the rejection are based on a false assertion that Fisher et al. is proper prior art but it is not.

D. CONCLUSION

The only timely and proper reference cited against the claims is Fisher et al. and it is conceded that Fisher et al. suggests nothing about a demonstration mode. There is therefore no basis to assert that Fisher et al. renders obvious the rejected claims under either 35 U.S.C. 103. A rejection based on a false assertion as to the effective filing date of a reference that, in fact, is not prior art under the statute because it is not prior to the effective filing date of the application is a legally improper rejection and cannot stand. The rejection should therefore be summarily reversed and the application passed to issue with all claims.

Respectfully submitted,


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VIII. CLAIMS APPENDIX

102. (Previously presented) In a food processing apparatus for performing a plurality of processes on a food ingredient including a heating element and a plurality of valves, the improvement being a manual control system, comprising:

means for selectively operating the apparatus in accordance with a normal operations mode in which the heating element and the plurality of valves may be operated in accordance with a normal operations program; and

means for selectively operating the apparatus in accordance with one of

(a) a program mode in which various programmable parameters that dictate operation in the normal operations program may be selectively excluded and other parameters may be established,

(b) a self-diagnostic mode in which faults in the apparatus are detected ,
and

(c) a demonstration mode demonstrating but not actually operating the normal operations mode except for selected functions.

103. (Original) The food processing apparatus of claim 102 in which the apparatus includes an electronic message display that is operated in accordance with one of the program mode, the self-diagnostic mode and the demonstration mode.

105. (Original) The food processing apparatus of claim 102 in which the apparatus includes an electronic display that is operated in accordance with the self-diagnostic

program to display error codes associated with different fault conditions that are detectable by the self-diagnostic program.

124. (Previously presented)The food processing apparatus of claim 103 in which the electronic display is selectively revealed during all of the program mode, the self-diagnostic mode and the demonstration mode.

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IX. EVIDENCE APPENDIX

NONE.

X. RELATED PROCEEDINGS APPENDIX

NONE